

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

WENDY LEA GRANT,	)	
	)	No. CV-08-00398-JPH
Plaintiff,	)	
	)	ORDER GRANTING DEFENDANT'S
v.	)	MOTION FOR SUMMARY JUDGMENT
	)	
MICHAEL J. ASTRUE, Commissioner	)	
of Social Security,	)	
	)	
Defendant.	)	
	)	
	)	

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BEFORE THE COURT are cross-motions for summary judgment noted for hearing without oral argument on September 25, 2009. (Ct. Rec. 17, 19-4). Attorney Maureen J. Rosette represents Plaintiff; Special Assistant United States Attorney Terrye Shea represents the Commissioner of Social Security ("Commissioner"). The parties have consented to proceed before a magistrate judge. (Ct. Rec. 8.) On August 27, 2009, plaintiff filed a reply. (Ct. Rec. 21.) After reviewing the administrative record and the briefs filed by the parties, the court **GRANTS** Defendant's Motion for Summary Judgment (Ct. Rec. 19-4) and **DENIES** Plaintiff's Motion for Summary Judgment (Ct. Rec. 17.)

**JURISDICTION**

Plaintiff filed applications for disability insurance benefits (DIB) on May 29, 2003 and SSI on August 12, 2003, both alleging onset as of July 1, 2002. (SSI, Tr. 572-574; DIB

1 application not in file.) The applications were denied initially  
2 and on reconsideration. (Tr. 68-71,77-80.)

3 Two hearings have been held in this case, both before the  
4 same Administrative Law Judge (ALJ), Paul Gaughen. At the first  
5 hearing on March 13, 2007, plaintiff, represented by counsel, and  
6 vocational expert K. Diane Kramer testified. (Tr. 625-660.) After  
7 this hearing the ALJ referred plaintiff for consultative  
8 psychological and physical evaluation. (Tr. 39.) At a  
9 supplemental hearing held November 1, 2007, plaintiff,  
10 psychological expert R. Thomas McKnight, Jr., Ph.D., and  
11 vocational expert Daniel R. McKinney testified. (Tr. 598-622.) On  
12 February 8, 2008, the ALJ found that plaintiff is not disabled.  
13 (Tr. 17-55.) The Appeals Council received additional evidence and  
14 denied plaintiff's request for review on November 5, 2008. (Tr.  
15 6-9.) Therefore, the ALJ's decision became the final decision of  
16 the Commissioner, which is appealable to the district court  
17 pursuant to 42 U.S.C. § 405(g). Plaintiff filed this action for  
18 judicial review pursuant to 42 U.S.C. § 405(g) on December 24,  
19 2008. (Ct. Rec. 2, 4.)

#### 20 **STATEMENT OF FACTS**

21 The facts have been presented in the administrative hearing  
22 transcripts, the ALJ's decision, the briefs of both plaintiff and  
23 the Commissioner, and are briefly summarized here.

24 Plaintiff was 39 years old at onset and 43 at the first  
25 hearing. (Tr. 129, 627.) She has a tenth grade education,  
26 attended Fullerton Community College in California and came close  
27 to earning her associate's degree. In 2007, plaintiff said she  
28

1 completed about three and a half years of college. (Tr. 168, 244,  
2 592, 628.) She has past relevant work as a waitress, caterer's  
3 helper, and photographer. (Tr. 629-631.) Plaintiff alleged  
4 disability onset as of July 1, 2002, due to neck, collar bone,  
5 back and knee problems, headaches, right shoulder pain, carpal  
6 tunnel syndrome (CTS) in both arms, pain and numbness in both arms  
7 and hands, ADHD, anxiety, and bipolar disorder. (Tr. 70, 73, 151,  
8 164 and 631-641.)

#### 9 SEQUENTIAL EVALUATION PROCESS

10 The Social Security Act (the "Act") defines "disability"  
11 as the "inability to engage in any substantial gainful activity by  
12 reason of any medically determinable physical or mental impairment  
13 which can be expected to result in death or which has lasted or  
14 can be expected to last for a continuous period of not less than  
15 twelve months." 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). The  
16 Act also provides that a Plaintiff shall be determined to be under  
17 a disability only if any impairments are of such severity that a  
18 plaintiff is not only unable to do previous work but cannot,  
19 considering plaintiff's age, education and work experiences,  
20 engage in any other substantial gainful work which exists in the  
21 national economy. 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B).  
22 Thus, the definition of disability consists of both medical and  
23 vocational components. *Edlund v. Massanari*, 253 F.3d 1152, 1156  
24 (9<sup>th</sup> Cir. 2001).

25 The Commissioner has established a five-step sequential  
26 evaluation process for determining whether a person is disabled.  
27 20 C.F.R. §§ 404.1520, 416.920. Step one determines if the person  
28

1 is engaged in substantial gainful activities. If so, benefits are  
2 denied. 20 C.F.R. §§ 404.1520(a)(4)(i), 416.920(a)(4)(i). If  
3 not, the decision maker proceeds to step two, which determines  
4 whether plaintiff has a medically severe impairment or combination  
5 of impairments. 20 C.F.R. §§ 404.1520(a)(4)(ii),  
6 416.920(a)(4)(ii).

7 If plaintiff does not have a severe impairment or combination  
8 of impairments, the disability claim is denied. If the impairment  
9 is severe, the evaluation proceeds to the third step, which  
10 compares plaintiff's impairment with a number of listed  
11 impairments acknowledged by the Commissioner to be so severe as to  
12 preclude substantial gainful activity. 20 C.F.R. §§  
13 404.1520(a)(4)(ii), 416.920(a)(4)(ii); 20 C.F.R. § 404 Subpt. P  
14 App. 1. If the impairment meets or equals one of the listed  
15 impairments, plaintiff is conclusively presumed to be disabled.  
16 If the impairment is not one conclusively presumed to be  
17 disabling, the evaluation proceeds to the fourth step, which  
18 determines whether the impairment prevents plaintiff from  
19 performing work which was performed in the past. If a plaintiff  
20 is able to perform previous work, that Plaintiff is deemed not  
21 disabled. 20 C.F.R. §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv).  
22 At this step, plaintiff's residual functional capacity ("RFC")  
23 assessment is considered. If plaintiff cannot perform this work,  
24 the fifth and final step in the process determines whether  
25 plaintiff is able to perform other work in the national economy in  
26 view of plaintiff's residual functional capacity, age, education  
27 and past work experience. 20 C.F.R. §§ 404.1520(a)(4)(v),  
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1 416.920(a)(4)(v); *Bowen v. Yuckert*, 482 U.S. 137 (1987).

2 The initial burden of proof rests upon plaintiff to establish  
3 a *prima facie* case of entitlement to disability benefits.

4 *Rhinehart v. Finch*, 438 F.2d 920, 921 (9<sup>th</sup> Cir. 1971); *Meanel v.*

5 *Apfel*, 172 F.3d 1111, 1113 (9<sup>th</sup> Cir. 1999). The initial burden is  
6 met once plaintiff establishes that a physical or mental

7 impairment prevents the performance of previous work. The burden

8 then shifts, at step five, to the Commissioner to show that (1)

9 plaintiff can perform other substantial gainful activity and (2) a

10 "significant number of jobs exist in the national economy" which

11 plaintiff can perform. *Kail v. Heckler*, 722 F.2d 1496, 1498 (9<sup>th</sup>

12 Cir. 1984).

#### 13 STANDARD OF REVIEW

14 Congress has provided a limited scope of judicial review of a

15 Commissioner's decision. 42 U.S.C. § 405(g). A Court must uphold

16 the Commissioner's decision, made through an ALJ, when the

17 determination is not based on legal error and is supported by

18 substantial evidence. *See Jones v. Heckler*, 760 F.2d 993, 995

19 (9<sup>th</sup> Cir. 1985); *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9<sup>th</sup> Cir.

20 1999). "The [Commissioner's] determination that a plaintiff is

21 not disabled will be upheld if the findings of fact are supported

22 by substantial evidence." *Delgado v. Heckler*, 722 F.2d 570, 572

23 (9<sup>th</sup> Cir. 1983) (*citing* 42 U.S.C. § 405(g)). Substantial evidence

24 is more than a mere scintilla, *Sorenson v. Weinberger*, 514 F.2d

25 1112, 1119 n. 10 (9<sup>th</sup> Cir. 1975), but less than a preponderance.

26 *McAllister v. Sullivan*, 888 F.2d 599, 601-602 (9<sup>th</sup> Cir. 1989);

27 *Desrosiers v. Secretary of Health and Human Services*, 846 F.2d

1 573, 576 (9<sup>th</sup> Cir. 1988). Substantial evidence "means such  
2 evidence as a reasonable mind might accept as adequate to support  
3 a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971)  
4 (citations omitted). "[S]uch inferences and conclusions as the  
5 [Commissioner] may reasonably draw from the evidence" will also be  
6 upheld. *Mark v. Celebrezze*, 348 F.2d 289, 293 (9<sup>th</sup> Cir. 1965).  
7 On review, the Court considers the record as a whole, not just the  
8 evidence supporting the decision of the Commissioner. *Weetman v.*  
9 *Sullivan*, 877 F.2d 20, 22 (9<sup>th</sup> Cir. 1989) (quoting *Kornock v.*  
10 *Harris*, 648 F.2d 525, 526 (9<sup>th</sup> Cir. 1980)).

11 It is the role of the trier of fact, not this Court, to  
12 resolve conflicts in evidence. *Richardson*, 402 U.S. at 400. If  
13 evidence supports more than one rational interpretation, the Court  
14 may not substitute its judgment for that of the Commissioner.  
15 *Tackett*, 180 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579  
16 (9<sup>th</sup> Cir. 1984). Nevertheless, a decision supported by  
17 substantial evidence will still be set aside if the proper legal  
18 standards were not applied in weighing the evidence and making the  
19 decision. *Browner v. Secretary of Health and Human Services*, 839  
20 F.2d 432, 433 (9<sup>th</sup> Cir. 1987). Thus, if there is substantial  
21 evidence to support the administrative findings, or if there is  
22 conflicting evidence that will support a finding of either  
23 disability or nondisability, the finding of the Commissioner is  
24 conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9<sup>th</sup> Cir.  
25 1987).

#### 26 ALJ'S FINDINGS

27 At the outset, the ALJ found plaintiff met the DIB  
28

1 requirements through December 31, 2007. (Tr. 17, 19.) The ALJ  
2 found at step one that plaintiff has not worked at substantial  
3 gainful activity levels since onset. (Tr. 19.) At steps two and  
4 three, the ALJ found that plaintiff suffers from degenerative  
5 arthritis of the cervical spine status post anterior cervical  
6 discectomy at C3-C4 with interbody fusion (in October 2004),  
7 degenerative arthritis of the right acromioclavicular joint status  
8 post arthroscopy of the right shoulder with open rotator cuff  
9 repair and excision of the right distal clavicle (in January  
10 2006), and a history of drug and alcohol abuse (DAA), impairments  
11 that are severe but which do not alone or combination meet or  
12 medically equal a Listing impairment. (Tr. 19-20.)

13 The ALJ found attention deficit hyperactivity disorder  
14 (ADHD), attention deficit disorder (ADD), bipolar disorder, post-  
15 traumatic stress disorder (PTSD), depression, anxiety, panic  
16 attacks, CTS, migraine headaches, asthma, history of healed  
17 fracture of the right distal fibula, left bunion and/or history of  
18 right bunionectomy are not severe impairments. (Tr. 19-20.) The  
19 ALJ found plaintiff's history of DAA was not material to  
20 determining disability because plaintiff testified "she is not  
21 using such substances" and the record indicates she remained  
22 capable of performing past relevant work "during the period(s)  
23 when such substance abuse reportedly did occur." (Tr. 20.)  
24 Plaintiff does not challenge this finding<sup>1</sup>. The ALJ found

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25  
26 <sup>1</sup>It appears from the record plaintiff has not abused  
27 substances since sometime after January 19, 2006, when she  
28 tested positive for THC and opiates. Plaintiff has reported  
several times she stopped DAA in 2006. There is no evidence

1 plaintiff less than completely credible. (Tr. 44-45.) At step  
2 four, relying on the VE, the ALJ found plaintiff's RFC for a  
3 significant range of light to medium work enables her to perform  
4 her past relevant work as a waitress, caterer's helper, and  
5 photographer. (Tr. 54.) Because the ALJ found plaintiff not  
6 disabled at step four, step five was unnecessary. Accordingly,  
7 the ALJ found that plaintiff is not disabled as defined by the  
8 Social Security Act. (Tr. 54.)

#### 9 ISSUES

10 Plaintiff contends the Commissioner erred as a matter of law  
11 by failing to properly weigh the evidence of psychological and  
12 physical impairment. Specifically, she asserts the ALJ failed to  
13 properly reject the opinions of several examining psychologists as  
14 well as the 2005 opinion of treating physician David H. Bare,  
15 M.D., and his PAC, Rogelio Cantu. (Ct. Rec. 18 at 13-18; 18-19.)  
16 The Commissioner responds the ALJ appropriately weighed the  
17 evidence. He asks the Court to affirm the ALJ's decision. (Ct.  
18 Rec. 19-3 at 7,9, 23-24.)

#### 19 DISCUSSION

##### 20 A. Weighing impairment evidence

21 In social security proceedings, the claimant must prove the  
22 existence of a physical or mental impairment by providing medical  
23 evidence consisting of signs, symptoms, and laboratory findings;  
24 the claimant's own statement of symptoms alone will not suffice.

25 \_\_\_\_\_  
26 of use after January 19, 2006. (Tr. 417, 505, 509.) On May 25,  
27 2006, plaintiff said the use of drugs or alcohol had not negatively  
28 affected her employment. (Tr. 409.)



1 20 C.F.R. § 416.908. The effects of all symptoms must be  
2 evaluated on the basis of a medically determinable impairment  
3 which can be shown to be the cause of the symptoms. 20 C.F.R. §  
4 416.929. Once medical evidence of an underlying impairment has  
5 been shown, medical findings are not required to support the  
6 alleged severity of symptoms. *Bunnell v. Sullivan*, 947, F. 2d  
7 341, 345 (9<sup>th</sup> Cr. 1991).

8 A treating physician's opinion is given special weight  
9 because of familiarity with the claimant and the claimant's  
10 physical condition. *Fair v. Bowen*, 885 F. 2d 597, 604-05 (9<sup>th</sup>  
11 Cir. 1989). However, the treating physician's opinion is not  
12 "necessarily conclusive as to either a physical condition or the  
13 ultimate issue of disability." *Magallanes v. Bowen*, 881 F.2d 747,  
14 751 (9<sup>th</sup> Cir. 1989) (citations omitted). More weight is given to  
15 a treating physician than an examining physician. *Lester v.*  
16 *Cater*, 81 F.3d 821, 830 (9<sup>th</sup> Cir. 1996). Correspondingly, more  
17 weight is given to the opinions of treating and examining  
18 physicians than to nonexamining physicians. *Benecke v. Barnhart*,  
19 379 F. 3d 587, 592 (9<sup>th</sup> Cir. 2004). If the treating or examining  
20 physician's opinions are not contradicted, they can be rejected  
21 only with clear and convincing reasons. *Lester*, 81 F. 3d at 830.  
22 If contradicted, the ALJ may reject an opinion if he states  
23 specific, legitimate reasons that are supported by substantial  
24 evidence. See *Flaten v. Secretary of Health and Human Serv.*, 44  
25 F. 3d 1435, 1463 (9<sup>th</sup> Cir. 1995).

26 In addition to the testimony of a nonexamining medical  
27 advisor, the ALJ must have other evidence to support a decision to  
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1 reject the opinion of a treating physician, such as laboratory  
2 test results, contrary reports from examining physicians, and  
3 testimony from the claimant that was inconsistent with the  
4 treating physician's opinion. *Magallanes v. Bowen*, 881 F.2d 747,  
5 751-52 (9<sup>th</sup> Cir. 1989); *Andrews v. Shalala*, 53 F.3d 1042-43 (9<sup>th</sup>  
6 Cir. 1995).

7 **B. Mental impairment - opinions of examining psychologists**

8 Plaintiff contends that the ALJ failed to properly reject  
9 some of the opinions of examining psychologists Paul Wert, Ph.D.,  
10 John Arnold, Ph.D., Dennis Pollack, Ph.D., and John Severinghaus,  
11 Ph.D. She alleges the Court should consider the post hearing  
12 opinion of examining psychologist Frank Rosenkrans, Ph.D. (Ct.  
13 Rec. 18 at 14-18.) The Commissioner responds that the ALJ  
14 appropriately weighed all of the opinions, and Dr. Rosenkrans's  
15 opinion is not reasonably likely to change the result. ( Ct. Rec.  
16 19-3 at 9-19.)

17 In October of 2004 (about two years after onset), Dr. Wert  
18 examined plaintiff, apparently for the purpose of determining  
19 appropriate placement for her preteen son. (Tr. 29, referring to  
20 Tr. 242-248.) The ALJ gave little weight to some of Dr. Wert's  
21 contradicted opinions because they appear inconsistent with  
22 plaintiff's signs on his [Dr. Wert's] own mental status  
23 examination, which showed she was "mildly depressed with logical,  
24 goal-directed thoughts and no signs of a thought disorder." (Tr.  
25 29, 50, referring to Tr. 247.) The ALJ observes Dr. Wert went on  
26  
27  
28

1 to diagnose, apparently primarily based on two test results<sup>2</sup>,  
 2 bipolar disorder with hypomanic or manic episodes, without  
 3 psychotic features; alcohol dependence by history; psychoactive  
 4 substance abuse NOS; antisocial personality disorder, and paranoid  
 5 personality disorder with passive-aggressive and self-defeating  
 6 traits. (Tr. 29,50, referring to Tr. 247.) The ALJ indicates Dr.  
 7 Wert further opined plaintiff's psychological, emotional and  
 8 probable chemical dependence problems would likely put any child  
 9 in her care at risk for neglect and possible abuse. (Id.)

10 The second reason the ALJ rejects Dr. Wert's opinion is that  
 11 it is "clearly inconsistent with other substantial medical  
 12 evidence of record." (Tr. 50.) The ALJ points out plaintiff has  
 13 not been treated by any psychiatrist, psychologist or other mental  
 14 health care professional at any time since onset<sup>3</sup> [other than for  
 15 substance abuse], indicating she did not suffer from the severe  
 16 conditions diagnosed by Dr. Wert. (Tr. 45,50; see e.g., Tr. 520:

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18 <sup>2</sup>the Minnesota Mutliphasic Personality Inventory-2  
 19 (MMPI-2) and the Millon Clinical Multiaxial Inventory-III  
 20 (MCMI-III)(Tr. 242). Dr. McKnight testified Dr. Wert's report  
 21 contains nothing about plaintiff's responses to the MMPI-2, nor  
 22 any interpretation. (Tr. 601.) He also notes the MCMI-III is a  
 23 copy of a computer-generated report. (Tr. 601-602.) The MCMI-III  
 24 states the information is "computer-assisted." (Tr. 245.)

25 <sup>3</sup>  
 26 On April 8, 2003, plaintiff indicated she had post-partum  
 27 depression in 2000 (Tr. 256), well before onset. After  
 28 plaintiff asked Mr. Cantu for a counseling referral on June 3,  
 2003, for family issues and possible depression (Tr. 306), he  
 referred her to Bill Martin (Tr. 307) but plaintiff never made  
 an appointment. On May 25, 2006, plaintiff indicated she saw a  
 therapist in California "off and on" for 13 years for "self-  
 esteem." (Tr. 409.) There are no records from California in the  
 file.

1 plaintiff stated in 2007 she had no history of mental treatment  
2 other than for substance abuse.) The lack of mental health  
3 treatment is especially striking since, as the ALJ points out,  
4 plaintiff has not been shy about seeking medical attention. He  
5 notes plaintiff "has made quite numerous requests for other health  
6 care providers in a variety of settings to provide narcotic  
7 analgesics despite benign physical and mental status signs on  
8 physical examination." (Tr. 45.) The ALJ is correct both that the  
9 complete lack of treatment for mental health issues is  
10 inconsistent with Dr. Wert's opinion, and that Dr. Wert's opinion  
11 is internally inconsistent.

12 To further aid in weighing the conflicting psychological  
13 evidence, the ALJ evaluated plaintiff's credibility and, as noted,  
14 found her less than fully credible. (Tr. 44-45.) Plaintiff does  
15 not challenge this finding on appeal. Credibility determinations  
16 bear on evaluations of medical evidence when an ALJ is presented  
17 with conflicting medical opinions or inconsistency between a  
18 claimant's subjective complaints and diagnosed condition. See  
19 *Webb v. Barnhart*, 433 F. 3d 683, 688 (9<sup>th</sup> Cir. 2005).

20 It is the province of the ALJ to make credibility  
21 determinations. *Andrews v. Shalala*, 53 F. 3d 1035, 1039 (9<sup>th</sup> Cir.  
22 1995). However, the ALJ's findings must be supported by specific  
23 cogent reasons. *Rashad v. Sullivan*, 903 F. 2d 1229, 1231 (9<sup>th</sup>  
24 Cir. 1990). Once the claimant produces medical evidence of an  
25 underlying medical impairment, the ALJ may not discredit testimony  
26 as to the severity of an impairment because it is unsupported by  
27 medical evidence. *Reddick v. Chater*, 157 F. 3d 715, 722 (9<sup>th</sup> Cir.  
28 1998). Absent affirmative evidence of malingering, the ALJ's

1 reasons for rejecting the claimant's testimony must be "clear and  
2 convincing." *Lester v. Chater*, 81 F. 3d 821, 834 (9<sup>th</sup> Cir. 1995).  
3 "General findings are insufficient: rather the ALJ must identify  
4 what testimony not credible and what evidence undermines the  
5 claimant's complaints." *Lester*, 81 F. 3d at 834; *Dodrill v.*  
6 *Shalala*, 12 F. 3d 915, 918 (9<sup>th</sup> Cir. 1993).

7 As the Commissioner correctly observes, plaintiff did not  
8 dispute the ALJ's finding that the complete lack of treatment also  
9 impugns her credibility with respect to mental health conditions.  
10 (Ct. Rec. 19-3 at 11.)

11 The ALJ relied on several factors when he assessed  
12 credibility. Perhaps most significantly,

13 No treating or examining physician has opined, or  
14 documented objective findings that would support  
15 a finding, that the claimant has impairment(s) that  
16 render her unable to perform all substantial  
17 gainful activity throughout any period of at least  
18 12 consecutive months since her alleged disability  
19 onset date.

20 (Tr. 45.)

21 The ALJ also relied on the significant discrepancies in  
22 plaintiff's statements and on the "substantial discrepancies  
23 between the claimant's statements and the documented signs,  
24 findings and treatment of record." (Tr. 44-45.)

25 There are several significant discrepancies in plaintiff's  
26 statements. Plaintiff told ER staff on April 23, 2003 her only  
27 prescribed medication was adderall, even though treatment provider  
28 Mr. Cantu, PAC, prescribed lortab on March 18, 2003, and flexeril  
and lortab on April 14, 2003. (Tr. 22-23, comparing Exhibit 3F/5-6  
with Exhibits 8F at 7-8, 11-12.) The ALJ observes plaintiff was  
again dishonest with ER staff about her prescriptions on July 13,

1 2003; August 13, 2003; November 12, 2003; December 15, 2003; May  
2 7, 2004; and June 30, 2004 (Tr. 24-27,47), a period of more than a  
3 year.

4 The ALJ found several substantial discrepancies between  
5 plaintiff's statements and the documented signs, findings and  
6 treatment in the record. (1) In January, July, and August of  
7 2003, plaintiff went to the ER for reported pain in her #8 tooth.  
8 On each visit was noted to be in no distress. Her teeth were in  
9 good repair with no obvious caries, gum inflammation, or  
10 looseness. She was prescribed lortab for dental pain. (Tr. 45.)  
11 As the ALJ points out, despite plaintiff's alleged pain, there is  
12 no record of a dental examination or treatment before or after the  
13 ER dates. (Id.) (2) Although plaintiff alleges disabling  
14 impairments, treating physician Dr. Bare and PAC Mr. Cantu opined  
15 on April 7, 2003, and April 4, 2005, plaintiff could perform  
16 sedentary work. (Tr. 22-23, 31, referring to Tr. 382-387.) (3) In  
17 contrast to allegations of severe impairment, after plaintiff's  
18 recovery from cervical surgery in October of 2004, treating  
19 neurosurgeon Dr. Hahn released plaintiff for sedentary work on  
20 January 18, 2005. Dr Hahn opined plaintiff would be able to  
21 perform her past relevant work as a server and other "light to  
22 moderate" work in a month. (Tr. 47, referring to Exhibit 7F at  
23 18.) (4) Despite claims of severe mental impairments, as noted,  
24 plaintiff admits she has had no treatment for such allegedly  
25 disabling disorders.

26 Several of plaintiffs activities are noted by the ALJ, and,  
27 while he does not specifically rely on them when assessing  
28 credibility, they are inconsistent with plaintiff's claimed

1 impairments. Plaintiff wrestled with her niece (Tr. 24, referring  
2 to Tr. 208, 7/13/03); tried to climb a fire escape  
3 (Tr. 25, referring to Tr. 210, 11/12/03); drove "despite her  
4 repeated reports of record that she does not drive" (Tr. 25,  
5 referring to Tr. 212, 11/22/03); rode her bike (Tr. 26, referring  
6 to Tr. 216, 12/15/03); jumped into a lake and fell on a rock (Tr.  
7 27, referring to Tr. 229, 6/30/04); slipped on rocks by the river  
8 (Tr. 27, referring to Tr. 332, 7/7/04), and played volleyball (Tr.  
9 32, referring to Tr. 426, 9/8/05). Plaintiff's activities  
10 throughout the relevant period further undermine her claims.

11 The ALJ's unchallenged credibility finding is supported by  
12 clear and convincing reasons, and fully supported by the record.  
13 See *Thomas v. Barnhart*, 278 F.3d 947, 958-959 (9<sup>th</sup> Cir.  
14 2002)(proper factors include inconsistencies in plaintiff's  
15 statements, inconsistencies between statements and conduct, and  
16 extent of daily activities). Noncompliance with medical care or  
17 unexplained or inadequately explained reasons for failing to seek  
18 medical treatment also cast doubt on a claimant's subjective  
19 complaints. 20 C.F.R. §§ 404.1530, 426.930; *Fair v. Bowen*, 885  
20 F.2d 597, 603 (9<sup>th</sup> Cir. 1989).

21 When he weighed the evidence of psychological impairment, the  
22 ALJ considered the May 22, 2007 opinion of consultative examining  
23 psychologist, Dr. Severinghaus, and of the testifying  
24 psychological expert, Dr. McKnight. (Tr. 41-42,44, 52-53.) With  
25 respect to Dr. Severinghaus's opinion, the ALJ states:

26 On mental status examination, Ms. Grant was observed  
27 to be clean with adequate grooming, well oriented,  
28 cooperative, and comfortable; she chuckled at times,  
made good eye contact, did not appear depressed, sat  
quietly without hyperactivity or fidgeting, and had

1 normal rate and flow of speech with normal articulation;  
2 she exhibited no unusual behaviors and no pain  
3 behaviors; and she demonstrated no behavioral evidence  
4 of ADHD, hypomania, depression or anxiety.

5 On psychological tests, [plaintiff's] responses  
6 indicated intellectual functioning in the high  
7 borderline to low average range. Dr. Severinghaus  
8 noted that neither Ms. Grant's 2004 psychological  
9 evaluation for custody investigation [by Dr. Wert],  
10 her 2006 psychological evaluation for public assistance  
11 [by Dr. Arnold], nor her 2007 psychological evaluation  
12 on referral from her attorney [by Dr. Pollack]  
13 documented 'in mental status observations or general  
14 or personal history, the kinds of behaviors and symptoms  
15 consistent with either ADHD or bipolar spectrum disorders.'

16 (Tr. 42, referring to Exhibit 22F.)

17 The ALJ observes Dr. Severinghaus diagnosed alcohol abuse and  
18 possible dependence in early sustained remission, cannabis abuse  
19 in early sustained remission, past/remote use of hallucinogenics,  
20 rule out bipolar II with hypomania, probable strong somatoform  
21 tendencies, personality disorder NOS with borderline features, low  
22 average to high borderline intelligence, history of ADHD (NOS)  
23 that is not well substantiated in recent records and is possibly  
24 controlled with medications, and a GAF of 55<sup>4</sup>. (Tr. 42.) Dr.  
25 Severinghaus opined plaintiff's prognosis is guarded "due to her  
26 likely character disorder" which would take a significant amount  
27 of time to resolve in therapy; she does not presently require  
28 either psychiatric consultation or ongoing personal counseling

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A Global Assessment of Functioning (GAF) of 55 indicates moderate symptoms (e.g., flat affect and circumstantial speech, occasional panic attacks) or moderate difficulty in social, occupational or school functioning (e.g., few friends, conflicts with peers or coworkers). STATISTICAL AND DIAGNOSTIC MANUAL OF MENTAL DISORDERS, Fourth Edition (DSM-IV), at p. 32.



1 (but might benefit from the latter); has no significant deficits  
2 in memory functioning or problem-solving beyond those imposed by  
3 her intellectual functioning; pace and persistence are "reduced  
4 somewhat by her various concerns" but she remains capable of  
5 functioning overall on a daily basis; interpersonal functioning is  
6 reduced mildly-to-moderately by depression and anxiety, and she  
7 appears capable of functioning in low stress situations. (Tr. 42,  
8 referring to Exhibit 22F.)

9 The ALJ considered psychologist Dr. McKnight's testimony  
10 that the record contains no clinical evidence to substantiate a  
11 diagnosis of ADHD, bipolar disorder, or personality disorder. (Tr.  
12 44.) The ALJ observes:

13 It is his [Dr. McKnight's] opinion, based on the  
14 medical evidence of record, that claimant does  
15 not have bipolar disorder. If the claimant had ADHD  
16 or a personality disorder, such impairments would  
17 have been present during the periods when she was  
18 employed; however, the record does not document  
19 that the claimant was ever unable to work as a  
20 result of ADHD and/or personality disorder and  
21 does not indicate that ADHD and/or personality  
22 disorder were contributing factors to her becoming  
23 unemployed<sup>5</sup>. While it is not possible to rule out  
24 somatoform disorder, the evidence of record does  
25 not appear to be consistent with a diagnosis of  
26 somatoform disorder.

27 (Tr. 44.)

28 Dr. Severinghaus similarly opines plaintiff has a reasonable

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23 Plaintiff has given several reasons for becoming unemployed. None  
24 involve mental impairments: plaintiff left her most recent job as  
25 a caterer because she moved to another city and had neck problems  
26 (2/6/07 and 3/7/07 at Tr. 417); she stopped working in July of  
27 2002 because she was "having a lot of neck problems at the time"  
28 (3/31/07 at Tr. 631); and she quit a catering job of 3 years  
duration in 2002 due "neck problems and had neck surgery" (5/17/07  
at Tr. 520).

1 work record, despite her various psychological issues. (Tr. 522.)  
2 Dr. McKnight testified most mental impairments manifest at least  
3 by the age of majority, meaning plaintiff apparently worked for  
4 many years (she told Dr. Weir she worked as a photographer for  
5 eight years, and then for seventeen years in the catering  
6 business)( Tr. 509) despite allegedly disabling mental  
7 impairments. The record clearly supports Drs. McKnight and  
8 Severinghaus's opinions.

9 In addition to rejecting Dr. Wert's opinion, the ALJ rejected  
10 the contradicted opinions of examining psychologists Drs. Arnold  
11 and Pollack for the same reasons: their assessments are  
12 inconsistent with plaintiff's signs on mental status examination,  
13 and they are "clearly inconsistent with other substantial medical  
14 evidence," e.g., no record of any mental health treatment. (Tr.  
15 51-52.) The ALJ's reasons for rejecting the contradicted opinions  
16 of some examining psychologists are supported by the opinions of  
17 examining psychologist Dr. Severinghaus (partially adopted by the  
18 ALJ), the ALJ's assessment of plaintiff's credibility, the  
19 complete lack of mental health treatment after onset, and the  
20 opinion of the testifying expert, Dr. McKnight.

21 The ALJ is responsible for reviewing the evidence and  
22 resolving conflicts or ambiguities in testimony. *Magallanes v.*  
23 *Bowen*, 881 F. 2d 747, 751 (9<sup>th</sup> Cir. 1989). It is the role of the  
24 trier of fact, not this court, to resolve conflicts in evidence.  
25 *Richardson*, 402 U.S. at 400. The court has a limited role in  
26 determining whether the ALJ's decision is supported by substantial  
27 evidence and may not substitute its own judgment for that of the  
28 ALJ, even if it might justifiably have reached a different result

1 upon de novo review. 42 U.S.C. § 405 (g).

2 The ALJ's rejection of the contradicted opinions of Drs.  
3 Wert, Arnold and Pollack is based on specific, legitimate reasons  
4 and supported by substantial evidence.

5 Plaintiff argues the ALJ erred by failing to properly weigh  
6 the opinion of examining psychologist Dr. Severinghaus and asks  
7 the Court to consider the post-hearing opinion of Dr. Rosenkrans.

8 The ALJ adopted much of Dr. Severinghaus's opinion.  
9 Plaintiff's assessed RFC includes a slight limitation in the  
10 ability to concentrate and a slight limitation in the ability to  
11 adapt to changes in the workplace; she is able to handle normal  
12 workplace stressors and requires an alcohol-free work environment.  
13 (Tr. 54.) The ALJ notes Dr. Severinghaus opined plaintiff has no  
14 significant deficits in memory functioning or problem solving  
15 beyond those imposed by her level of intellectual functioning. He  
16 opined her persistence and pace are "reduced somewhat by her  
17 various concerns" but "she remains capable of functioning overall  
18 on a daily basis." (Tr. 53, referring to Tr. 523.)

19 The ALJ rejected the assessed limitation on persistence and  
20 pace because, as Dr. McKnight testified, plaintiff worked for many  
21 years [25] without being affected by mental disorders or resulting  
22 impairment and Dr. Severinghaus made a similar observation. (Tr.  
23 522.) Dr. McKnight testified plaintiff's persistence and pace may  
24 be somewhat slowed now by the amount of pain medications taken,  
25 but he acknowledged such an opinion is outside his as well as Dr.  
26 Severinghaus's scope of expertise. (Tr. 606.) Dr. McKnight  
27 opined psychological issues do not contribute to plaintiff's  
28 alleged inability to work because her work record shows she has

1 the ability to handle normal work stress, it appears with or  
2 without DAA. (Tr. 604-608.)

3 Dr. Severinghaus assessed a mild to moderate reduction in  
4 interpersonal functioning due to depression and anxiety (Tr. 523).  
5 Because the ALJ found plaintiff does not suffer the severe mental  
6 impairments of depression and anxiety, he was not required to  
7 adopt this limitation. (Tr. 19, 45.)

8 After the ALJ's adverse decision, plaintiff underwent an  
9 evaluation by Dr. Rosenkrans on July 10, 2008. (Tr. 588-595.) The  
10 Court agrees with the Commissioner that, considering the record as  
11 a whole, Dr. Rosenkans's opinion does not create a reasonable  
12 possibility of changing the ALJ's decision. (Ct. Rec. 19-3 at 20.)

13 The evidence as a whole indicates plaintiff suffers at most  
14 minimal limitations.

15 The ALJ provided clear and convincing reasons supported by  
16 the record for finding plaintiff's allegations not fully credible.  
17 He weighed the evidence and failed to adopt some of the  
18 contradicted opinions of some of the examining psychologists. He  
19 relied on the opinions of other treating, examining, and  
20 testifying professionals, and on his assessment of plaintiff's  
21 credibility. The ALJ gave specific and legitimate reasons,  
22 supported by substantial evidence, for rejecting some of the  
23 contradicted opinions.

24 Accordingly, the ALJ's determination that plaintiff's alleged  
25 mental impairments of ADD, ADHD<sup>6</sup>, bipolar disorder, type II

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27 With respect to ADD or ADHD, plaintiff's diagnosis of ADHD is by  
28 self-report. (Tr. 603.) Drs. Severinghaus and McKnight agree  
that even if plaintiff has ADD, it is addressed reasonably well

1 bipolar disorder, PTSD, depression, anxiety, and panic attacks are  
2 non-severe (i.e., cause no more than a slight abnormality that  
3 would have no more than a minimal effect on her ability to  
4 work)(Tr. 19-20), is fully supported by the medical and other  
5 evidence, and free of legal error. See 20 C.F.R. §§ 404.1521 and  
6 416.921.

7 **C. Physical impairment**

8 Plaintiff contends the ALJ failed to properly reject the  
9 April 4, 2005, contradicted opinion of treating physician David  
10 Bare, M.D. and PAC Mr. Cantu, that plaintiff is limited to  
11 sedentary work. (Ct. Rec. 18 at 18-19, referring to Tr. 384-387.)  
12 Dr. Bare and Mr. Cantu acknowledge Dr. Hahn released plaintiff for  
13 sedentary work on January 18, 2005. (Tr. 385.)

14 In assessing this evidence, the ALJ correctly observes  
15 treating physician Dr. Hahn not only released plaintiff for  
16 sedentary work on January 18, 2005, she opined plaintiff would be  
17 capable of her past work as a server and other light to moderate  
18 work, in a month. (Tr. 47, referring to Tr. 272.) This is a  
19 specific, legitimate reason supported by substantial evidence to  
20 discredit the contradicted opinion of a different treating source  
21 that plaintiff is limited to sedentary work. It is also  
22 interesting that at the January 18, 2005, appointment, plaintiff

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23 with medication, also indicating it is non-severe. (Tr. 604.)  
24 Plaintiff states repeatedly that adderall is effective. (See  
25 e.g., anxiety is treated well with adderall, 4/8/03 at Tr. 256);  
26 feels is doing well with adderall, 10/29/04 at Tr. 242; has a  
27 good response to adderall, 7/7/05 at Tr. 399; adderall is "very  
28 effective" 5/4/06 at Tr.460; focus and concentration are  
improved with adderall, 4/12/07 at Tr. 520; and focus and  
concentration decreased when she stopped adderall, 7/11/07 at  
Tr. 558.)

1 told Dr. Hahn she wanted to play sports, swim and lift weights,  
2 indicating her own belief she was not limited to sedentary  
3 activities. (Tr. 272.)

4 The ALJ's second reason for rejecting the RFC for sedentary  
5 work is that the record does not specifically indicate whether Dr.  
6 Bare examined plaintiff prior to giving the opinion. (Tr. 47.)  
7 The ALJ also notes Mr. Cantu opined on April 7, 2003, plaintiff  
8 had cervical spondylosis that limited her to sedentary work. (Tr.  
9 22-23, referring to Tr. 382-383.) Mr. Cantu's first appointment  
10 with plaintiff was less than a month earlier, on February 13,  
11 2003. (Tr. 21-23.)

12 When determining plaintiff's RFC, the ALJ considered the  
13 opinion of A. Peter Weir, M.D., who examined plaintiff on May 15,  
14 2007, at the ALJ's request. (Tr. 508-518.) Dr. Weir's report  
15 indicates plaintiff reported her right shoulder is worse than  
16 before surgery [on January 11, 2006 at Tr. 495]; she has neck  
17 pain, stiffness and limited range of motion; tension headaches;  
18 numbness in both arms at times, and numbness in the long fingers  
19 of both hands. Using her right arm is painful, especially  
20 reaching overhead. (Tr. 508.)

21 According to Dr. Weir, plaintiff indicates her past  
22 psychological history consists of ADHD and bipolar disorder. She  
23 spends most of the day sleeping. Plaintiff watches television,  
24 enjoys listening to music and playing the guitar, and does light  
25 housework. (Tr. 509.) The ALJ points out:

26 Dr. Weir noted that [plaintiff] was neat, clean, well  
27 groomed, cheerful, pleasant, cooperative and in no  
28 distress. . . [she] had no difficulty removing or  
replacing her socks, arose easily from a chair, and  
had no difficulty getting on or off the exam table[.]

1 . . . [She had] normal reflexes, negative straight leg  
2 raising tests, and normal 5/5 muscle strength  
3 throughout . . . [she] was able to stand on one leg  
4 at a time and perform a quadriceps squat; had decreased  
5 sensation to light touch in the long fingers of both  
6 hands, but otherwise no areas of decreased sensation  
7 to light touch in the upper or lower extremities[.]

8 (Tr. 49, referring to Tr. 509-511.)

9 Dr. Weir diagnosed degenerative arthritis of the cervical  
10 spine and the right acromioclavicular joint. (Tr. 512.) The ALJ  
11 assessed an RFC for physical limitations based on Dr. Weir's,  
12 including in relevant part: the ability to lift up to 10 pounds  
13 continuously, 11-20 frequently, and 21-50 pounds occasionally;  
14 sit, stand, or walk 6 hours out of 8; sit without interruption for  
15 2 hours, and stand or walk without interruption for 1 hour;  
16 occasionally lift overhead with the right hand, and climb ladders  
17 or crawl occasionally. (Tr. 53, referring to Tr. 512.)

18 The ALJ's reasons for rejecting the contradicted opinion of  
19 treatment providers Dr. Bare and Mr. Cantu are specific,  
20 legitimate and supported by substantial evidence. Examining  
21 physician Dr. Weir's opinion supports an RFC for greater than  
22 sedentary work, but, contrary to plaintiff's argument, the ALJ  
23 relied on more than simply this opinion when he rejected Dr. Bare  
24 and Mr. Cantu's RFC. The ALJ properly weighed and discussed the  
25 contradicted medical opinions. His reasons for rejecting some of  
26 the opinions are legitimate, specific and supported by substantial  
27 evidence.

#### 28 **D. Agency opinions**

Plaintiff alleges the ALJ failed to properly reject the  
December 2, 2004, opinion of agency reviewing psychologist Edward  
Beaty, Ph.D. [affirmed by Joe Gardner, Ph.D., on April 4, 2005],

1 that plaintiff suffers from an affective disorder, antisocial  
2 personality disorder, paranoid personality disorder with passive-  
3 aggressive and self-defeating traits, and substance addiction  
4 disorder, resulting in several moderate work-related limitations.  
5 (Ct. Rec. 18 at 14, 18, referring to Tr. 361,364,368-369,371-377.)  
6 The Commissioner responds that the ALJ rejected the opinion  
7 because it is inconsistent with (1) other substantial evidence,  
8 including plaintiff's benign clinical mental signs during repeated  
9 psychological and physical examinations, and (2) with the record  
10 as whole, which documents no treatment by any psychiatrist,  
11 psychologist, or other mental health treatment professional since  
12 onset. (Ct. Rec. 19-3 at 12-13, referring to Tr. 53.) The  
13 Commissioner is correct. Additionally, the ALJ rejected without  
14 error the opinion Dr. Beaty reviewed, Dr. Wert's 2004 evaluation.  
15 (See Tr. 373.) The ALJ did not err in his treatment of the  
16 reviewing agency opinion.

#### 17 CONCLUSION

18 Having reviewed the record and the ALJ's conclusions, this  
19 court finds that the ALJ's decision is free of legal error and  
20 supported by substantial evidence..

#### 21 IT IS ORDERED:

22 1. Defendant's Motion for Summary Judgment (Ct. Rec. 19) is  
23 GRANTED.

24 2. Plaintiff's Motion for Summary Judgment (Ct. Rec. 17) is  
25 DENIED.

26 The District Court Executive is directed to file this Order,  
27 provide copies to counsel for Plaintiff and Defendant, enter  
28 judgment in favor of Defendant, and **CLOSE** this file.



1 DATED this 28<sup>th</sup> day of October, 2009.

2  
3 s/ James P. Hutton

4 JAMES P. HUTTON  
5 UNITED STATES MAGISTRATE JUDGE  
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